INDEPENDENT REVIEW BOARD
444 North Capitol Street, NW, Suite 528
Washington, DC 20001
(202) 434-8080
Facsimile (202) 434-8084
Corruption Hotline (800) CALL IRB

Holmes ID-40
Werthmann ID-498

April 20, 2000

VIA UPS OVERNIGHT MAIL

Lawrence Brennan, President
IBT Local Union 337
2801 Trumbull Avenue
Detroit, Michigan 48216

Re: Decision on Charges Against Local 337
Vice President Robert F. Holmes
and Former Member Thomas Werthmann

Dear Mr. Brennan:

The Independent Review Board has reviewed your supplemental decision of March 13, 2000, in the above-captioned matter, and finds the decision to be not inadequate.

Very truly yours,

Members of the
Independent Review Board

By: _____
John J. Cronin, Jr.
Administrator

cc: James P. Hoffa, General President, IBT
Patrick J. Szymanski, Esq.
Marc G. Whitefield, Esq.
Mr. Robert F. Holmes
Mr. Thomas Werthmann

BEFORE THE EXECUTIVE BOARD OF

TEAMSTERS LOCAL UNION NO. 337

In The Matter Of The Charges Filed By

COLONEL W. MYERS

Against

ROBERT F. HOLMES and
THOMAS WERTHMANN

Charges Dated: July 23, 1999

Hearings Held: August 6, 1999

Decision Dated: November 23, 1999

Supplemental Decision Dated: March 13, 2000

This supplemental decision follows the return of these matters for reconsideration by the Independent Review Board (IRB).

1. Procedural Background.

On November 23, 1999, following receipt of the IRB's ten-day letter dated November 15, 1999, Local 337's Executive Board issued a written decision which contained written findings setting forth the specific actions taken and the reasons for those actions. More specifically, we found that the charges against former member Thomas Werthmann should be dismissed and that the charges against Local 337 Vice President Robert F. Holmes should be sustained, but only to the extent that they allege that he violated Local 337's Bylaws in connection with the Local Union's bargaining relationship with Shar Vending, for which a ten-day suspension from his Union employment was found to be an appropriate penalty.

On January 28, 2000, IRB advised Local 337 President Larry Brennan that the November 23 decision was "inadequate," citing three areas in which the decision was considered unacceptable, and returned the matter for reconsideration. On February 9, 2000, Brother Brennan forwarded to IRB a sworn statement indicating that the matter would be reconsidered by Local 337's Executive Board not later than March 9, 2000 and that a written supplemental decision would issue not later than March 15, 2000. After discussing the matter with the IRB's chief investigator, counsel for Local 337 notified IRB that it was not the intention of Local 337 to conduct a de novo evidentiary hearing but,

instead, to meet to reconsider its earlier decision, as IRB had directed.

On February 17, 2000 IRB Administrator John J. Cronin, Jr., advised Brennan that Local 337 had failed to comply with the IRB Rules' requirement that written findings setting forth the specific action taken and the reasons for that action be issued within 90 days of the IRB's referral, and directed the Local Union to do so within seven days. On February 21, 2000, Local Union counsel communicated with Mr. Cronin, enumerating the actions taken by Local 337 to comply with the IRB rules following referral of the proposed charges on July 15, 1999. In this regard, charges were filed, as directed by IRB, an evidentiary hearing was conducted, as directed by IRB, and, on November 23, 1999, a decision was issued setting forth specific action taken and the reasons for that action. More than two months later, IRB directed the Local Union to reconsider its decision, which the Union advised IRB that it would do. Local 337 also assured IRB it would issue a written decision on reconsideration on or before March 15, 2000, a deadline that was established to provide an adequate opportunity to consider the points raised in IRB's January 28 letter.

On March 2, 2000, the Executive Board of Local 337 met to reconsider its earlier ruling and now issues this written decision.

2. Issues Raised By IRB.

The IRB's January 28, 2000, decision concludes that the Executive Board's decision dismissing the charges against former Local 337 member Werthmann and certain of the charges against Local 337 Vice President Robert F. Holmes was "inadequate."

3. Supplemental Findings and Actions.

A. General standards for imposing discipline.

We do not dispute IRB's authority to interpret the IBT Constitution. We are, however, concerned about the possible unfairness of imposing serious and stigmatizing discipline against two persons, one of whom has been a member in good standing and respected Local Union official for more than three decades, based on standards that are continuing to evolve in IRB decisions and which may not be entirely congruent with principles developed in other areas of labor law. Furthermore, we cannot fail to stress that the "sham contract" and "sham membership" allegations that are presently before us arise in circumstances that are completely devoid of any suggestion of improper self dealing by a Union official, unlawful impairment of members' rights, associations with organized crime or other forms of corruption forbidden by the Consent Decree.

In either case, we are mindful and sensitive to the obligation of every member of the IBT to "eradicate corruption from the IBT." United States v. Teamsters, 803 F.Supp. 806, 814 (S.D.N.Y. 1992). We are also mindful and sensitive, however, to

the requirement of Title I of the Labor Management Reporting and Disclosure Act that union disciplinary proceedings be conducted fairly and in accordance with traditional notions of due process. E.g., 29 USC Sec. 411 (a)(5). Imposing discipline against a member based on vague, uncertain or contradictory criteria, applied retroactively to conduct occurring prior to the development of the applicable standards, could raise questions about our faithfulness to principles of due process and fairness. E.g., Semancik v. United Mine Workers, 466 F.2d. 144 (3d Cir. 1992).

In reviewing the issues presented in these matters, we have endeavored to respect both the obligations imposed by the Consent Decree and the need for fairness and due process in considering the disciplinary charges against former member Werthmann and Brother Holmes.

B. IRB's standards for identifying "sham contracts."

IRB's current decisions regarding "sham contract" and "sham membership" issues appear for the most part to have involved situations in which there were explicit concerns about improper organized crime associations. Chieco v. Teamsters, 156 LRRM 3175 (S.D.N.Y. 1997), for example, involved Local 1034, a pervasively corrupt and mob infiltrated Local Union in New York. IRB's decision concerning Local 377 and its former Recording Secretary and Business Agent, Jerry Morrison, explicitly condemned the use of a "sham contract" to facilitate improper associations with

organized crime figures. Similarly, IRB's decision involving Local 813, the successor to Local 1034,and former members Michael A. Marabello, Michael Generoso, Jr., and Vincent Generoso, articulates serious concerns about the use of a "sham contract" to facilitate improper associations with members of the Genovese organized crime family.

These and other decisions by IRB, however, leave some uncertainty about how "sham contract" and "sham membership" issues should be resolved in situations, such as this one, in which there are no allegations of self dealing by Union officials, no hint of organized crime associations, and no allegations of other forms of corruption prohibited by the Consent Decree.

Among the questions for which we have been unable to find clear answers are the following:

* Is it per se improper for an owner or supervisor to be permitted to become or remain a member of the Union?
* Is it per se improper for an owner or supervisor to be covered by a labor contract with the Union?
* Is the line between permissible and impermissible conduct crossed when an owner or supervisor is permitted to become a participant or beneficiary of a Union-sponsored Taft-Hartley benefit fund?

* Is a contract rendered a "sham" when it is not duly ratified by employees who are covered by it?
* Is the failure of a Local Union aggressively to police and enforce a contract sufficient by itself to render a contract "sham"?
* Is it per se improper for a Local Union to enter into a collective bargaining relationship with an employer without an initial manifestation of assent to this by a majority of the employer's employees?
* Must there be additional evidence of illegal corruption, such as ties to organized crime, self dealing by a Union official or other corruption, for a contract to be a sham?

The fact that there are no clear answers to these questions, and were no clear answers to them when the conduct that is before us occurred, has been taken into account in determining the appropriateness of discipline and the magnitude of discipline in the present cases.

C. The Werthmann Related Charges.

Our decision to dismiss the Werthmann-related charges of "sham membership" and "sham contract" was rejected by IRB because the NLRB cases and U.S. Department of Labor regulations, which we cited to show an overall lack of consistency in doctrine, nonetheless require that there be certain limitations on the

involvement of employer and supervisor members in internal union affairs, and these limitations were not formally adopted by the Local Union when Werthmann was admitted as a member. IRB further rejected our view of the Werthmann contract because Werthmann, the owner and employer, was the sole member and had no other employees to be covered by the contract, and because the IRB disagreed with the Local Union's interpretation of Article XIV, Section 3 of the IBT Constitution.

We have reconsidered our decision concerning the Werthmann-related charges in light of these criticisms and have decided to sustain the charges against both charged parties. Although we are advised that the U.S. Supreme Court has held that "in the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives,"[1] we will incorporate and memorialize the legal restrictions on employer and supervisory memberships and other pertinent matters into a formal Executive Board resolution and into our Local Union election of officers rules. Proposed guidelines for this purpose are attached as Exhibit A and will be applied to all contracts and bargaining relationships that were the subject of IRB sworn examinations.

---

[1]. NLRB v. News Syndicate Co., Inc., 365 U.S. 695, 699-700 (1961).

We acknowledge, of course, that IRB has more authority than we to interpret the IBT Constitution and will therefore no longer press our construction of Article XIV, Section 3.

We will sustain the charges of sham membership and sham contract in the Werthmann-related charges for several reasons. The Werthmann relationship is of relatively recent origin. The first contract was executed in January of 1997. Although the contract arguably contemplated the eventual employment of employees, the owner and employer was the only member ever covered by the contract or ever employed by the company. For his part, Werthmann did not work, and had not worked, in an industry in which Local 337 or other Teamster Locals have traditionally represented employees. It seems clear that Werthmann entered into the agreement to enhance his relationships with unionized firms with which he does business. More importantly, it appears that Brother Holmes was aware that this was the purpose of the contract which was never really honored or intended to be enforced. Finally, although we are unaware of any evidence suggesting that there was another corrupt purpose behind this relationship, it nonetheless created the potential for improperly skewing the democratic process and possibly engendering corruption in the Local Union. We will consider the penalties for the violations by Werthmann and Brother Holmes later in this decision.

B. The Shar Vending-Related Charges.

IRB rejected our decision that the Shar Vending collective bargaining agreement was not a "sham contract" because of Holmes' testimony, from which IRB concluded that Holmes regarded the arrangement as a sham, and because IRB concluded that Holmes had "colluded" in non-enforcement of the agreement.

We have reconsidered our decision concerning the Shar Vending relationship, but have decided not to reverse our decision that the Shar Vending-related charges against Holmes should be sustained only insofar as they allege violations of Local 337's Bylaws. Preliminarily, we note that IRB appears to have accepted our view that "sham memberships" are not at issue here. Although the IRB's proposed charges were based on the claim that Holmes entered into a sham contract in order to permit the mother and husband of the owner "to fraudulently obtain membership[s] in Local 337," IRB's January 28 letter appears to accept our conclusions (1) that nothing in Article XIV, Section 3 of the IBT Constitution prohibits Stella Chetosky or Chester Czernel from being members of Local 337[2] and (2) that Brother Holmes had nothing to do with their obtaining or maintaining membership in the Local Union in the first instance.[3]

---

[2] Although they are in the same family, neither are owners of Shar Vending.

[3] They became Local 337 members by transferring from former Local 985 many years before Holmes was assigned to Shar Vending.

Elimination of the sham and fraudulent membership allegations diminishes the severity of the misconduct asserted in the Shar Vending related charges.

Furthermore, IRB's discussion of the Shar Vending arrangement in the January 28 letter appears to center on Brother Holmes' perceptions about and passivity in administering Local 337's relationship with Shar Vending rather than on whether the labor agreement that these parties reduced to writing and signed was valid and legally enforceable. Thus, we understand the essence of a charge of "sham" contract to mean that the agreement was not genuine, counterfeit or false.[4] If we are correct on this point, there is little doubt that Holmes signed a legal and valid contract.

We are advised that the courts have consistently rejected employer defenses to contract enforcement actions seeking payment of delinquent fringe benefit contributions premised on asserted union passivity or collusion, such as (1) that the union abandoned or acquiesced in the employer's past violations,[5] (2) that the bargaining parties did not intend to require fringe

---

[4] Webster's Third International Dictionary, at 2086; Black's Law Dictionary, 3rd ed. at 1233.

[5] Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310 (2nd Cir. 1990) [claim that Local 814, IBT had abandoned contracts by non-enforcement no defense to recovery on behalf of 12 non-members covered by contracts; owner had made contributions and forwarded union dues only on behalf of two family members].

benefit payments on behalf of everyone,[6] (3) that oral representations were made by the union to the effect that the employer could simply disregard the text of the contract,[7] and (4) that there was a lack of majority status when the contract was entered into.[8] In other words, federal courts consider a contract to be valid, binding and enforceable even though the union may have been less than diligent, aggressive, or straightforward in negotiating, honoring and enforcing it.

IRB also asserts that Holmes "colluded" in the non-enforcement of the Shar Vending contract by allowing the employer to exclude a non-family member, Edward Masiak, from membership because of the cost of making health insurance contributions on his behalf. However, the charges IRB proposed did not allege that Holmes engaged in collusion with Shar Vending's owner to exclude Masiak from membership and health insurance; rather, they

---

[6] Central States, etc. Pension Fund v. Gerber Truck Serv., Inc., 870 F.2d 1148 (7th Cir. 1989)(en banc)[verbal agreement with union agent to make contributions only on three drivers hired from acquired company no bar to recovery on behalf of 18 others].

[7] Teamsters Local 348 Health & Welfare Fund v. Kohn Beverage Co., 749 F.2d 315 (6th Cir. 1984)[union's refusal to take strikebreakers into membership despite union shop clause and principal officer's statement that they would not be eligible for benefits no bar to recovery of contributions due on their behalf under labor agreement].

[8] Agathos v. Starlite Motel, 977 F.2d 1500 (3rd Cir. 1992)[union agreement that employer pay contributions on only two of as many as ten employees no defense to recovery]; Central States v. Gerber Truck, supra, 870 F.2d at 1153.

alleged merely that this happened "without protest" from Holmes. We infer that there was no charge of this kind because we have searched the record in vain for any evidence that Holmes made any agreement with the employer to deprive Masiak of membership and/or health insurance.[9] According to Stella Chetowski, the only persons responsible for Masiak being out of the Union and excluded from the health insurance were the employer representatives who paid the health insurance premiums.[10] Holmes gave undisputed testimony that he never received a complaint from any Shar Vending member about this.[11]

In sum, we are not persuaded that Brother Holmes' passivity in administering the bargaining relationship, including his violation of Local 337's Bylaws in allowing the contract to renew without consulting with the members covered by it, resulted in an agreement that was sham, counterfeit, or unenforceable. Unlike

---

[9] Collusion denotes a "secret agreement" Webster's Third International Dictionary, supra, at 446. "A secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose." Blacks Law Dictionary, supra, at 240.

[10] "They took Ed off because they couldn't afford to pay his insurance, so I don't think Ed has sick. He used to work for them, but I think he's out of the union. Insurance is getting to them, you know." (Exh. 9 at 7)

[11] As we previously found, the record is not clear as to whether Masiak continued working for Shar Vending after withdrawing from membership in Local 337. We will attempt to resolve that uncertainty, and create the opportunity to demonstrate the validity of the Shar Vending contract, by asking the Michigan Conference of Teamsters Welfare Fund to conduct an audit of Shar Vending's books and records.

the Werthmann contract, the Shar Vending agreement had a long history, covered rank-and-file members, including at least one non-family member, and applied to persons performing work in an industry in which Local 337 and other Teamster locals across the country have traditionally exercised jurisdiction. Although we have not condoned, and do not condone, the manner in which Holmes administered and viewed the Shar Vending arrangement, we cannot conclude that either the memberships or the contract were "sham," as charged.

4. Conclusions.

We have now found that Thomas Werthmann, a withdrawn member of Local 337, violated Article XIX, Section (7)(b)(2)of the IBT Constitution because he brought reproach upon the Union by entering into a sham contract and obtaining a sham membership in the Local Union. Since the contract expired on January 2, 2000, and has not been renewed, no further relief appears to be warranted to address the "sham contract" violation. With respect to the "sham membership" charge, we will apply the same penalty to Werthmann that our Joint Council applied in an earlier case and permanently bar him from membership in the IBT.

We have previously found that Brother Holmes violated cited sections of Local 337's Bylaws and therefore Article XIX, Section 7(b)(1) of the IBT Constitution in connection with the Shar Vending-related charges which warranted a ten-day suspension from his Union employment, with the admonition that future violations

will result in further discipline, up to and including termination of his employment. We have now found that Brother Holmes also violated Article XIX, Section 7(b)(2) and brought reproach upon the Union by entering into a "sham contract" with Werthmann Sales in order to permit Thomas Werthmann to fraudulently obtain membership in Local 337. The issue now is what additional penalty should be imposed upon Brother Holmes for this misconduct.

As we earlier stated, we do not understand the Consent Decree to have abrogated or modified the legal requirement that union disciplinary proceedings be conducted in accordance with traditional notions of due process, including fair notice and reasonably ascertainable standards of conduct. Semancik v. United Mine Workers, 466 F.2d 144, 157 (3rd Cir. 1972)["fair notice of prohibited acts" required in union disciplinary procedures]. We also understand that penalties in union discipline cases should be fashioned in accordance with the principles customarily applied in labor arbitration cases, which in most instances require application of the concept of progressive discipline,[12] and in all cases require that the "punishment fit the crime."[13]

---

[12] Unless an "extremely serious offense" has been committed, arbitrators "prefer to apply progressive discipline," Elkouri & Elkouri, How Arbitration Works, 5th ed., at 916 (BNA, 1997).

[13] In arbitration it is "axiomatic that the degree of penalty should be in keeping with the seriousness of the

In 1996 or 1997, when Brother Holmes entered into the Werthmann agreement, neither the NLRB nor the DOL authorities flatly or unconditionally barred employers or supervisors from membership in unions. Indeed, we do not understand such an unconditional bar to exist currently. Furthermore, in 1996 and 1997, IRB rulings with respect to "sham contracts" and "sham memberships," particularly as applied to the negotiation of new contracts and the admission of new members, were still inchoate and, in almost all cases, had been applied to cases where organized crime influence or actual or potential self dealing by Union officials were also present. Neither of these elements is present in the Werthmann-related charges.[14]

In light of these mitigating circumstances as well as Brother Holmes' more than 30 years of otherwise unblemished service as a member and official of the Local Union, and in accordance with the principles of progressive discipline, we conclude that the appropriate penalty to be levied against Brother Holmes for his violations of the IBT Constitution and Local 337 in the Werthmann related matter is an additional 20 day suspension from his Union employment, with the additional

---

offense." Capital Airlines, Inc., 25 LA 13, 16 (Stowe, 1955).

[14] Nor are they present in the Shar Vending charges either. Further, we reiterate that the contract itself establishes that, when he signed it, Holmes had some reason to believe that it would ultimately cover additional rank-and-file members at a later date.

admonition that he will be subject to discharge and receive at least a six month suspension from employment should he engage in any similar misconduct in the future.

We therefore order that Brother Robert F. Holmes be suspended from employment by Local 337 for a total of 30 days, with the admonishment that further violations of the IBT Constitution or Local 337's Bylaws will be met with further discipline, at least a six month suspension and up to and including his discharge from Union employment. We also order that former Brother Thomas Werthmann be permanently barred from IBT membership.

Finally, we dismiss the charges that Brother Holmes violated the IBT Constitution in connection with the Shar Vending-related charges.

LAWRENCE BRENNAN, President

JERRY BLISS, Local 337 Member, Replacing Secretary Treasurer Colonel Wayne Myers

MICHAEL MARTIN, Local 337 Member, Replacing Vice President Robert F. Holmes

RICHARD GREMAUD, Recording Secretary

MICHAEL TOWNSEND, Trustee

ROBERT BARNES, Trustee

H. R. HILLARD, Trustee